No. 84-860

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

ROBERT J. PATTON,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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57pp

QUESTIONS PRESENTED

1. Whether the standards regarding an individual's reasonable expectations of privacy in a car with its door left open enunciated in Texas v. Brown, 103 S.Ct. 1535 (1983) apply to this case where the arresting officer ordered petitioner to get away from the car door?

2. Whether the arresting officer's testimony at the New Jersey state hearing on the motion to suppress, that his reason for searching petitioner's car was to find narcotics, renders his subsequent testimony at the federal hearing on his motion to suppress, incredible as a matter of law?

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OPINION BELOW

The memorandum opinion of the United States Court of Appeals for the Third Circuit affirming the conviction of Robert J. Patton is set forth in the appendix, infra. at pp. 1a-2a. The Opinion of the District Court, District of New Jersey is set forth at 11. 3a-20a.

JURISDICTION

The Judgment of the United States Court of Appeals for the Third Circuit,

affirming petitioner's conviction was entered on September 28, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fourth Amendment to the United States Constitution.

> The right of the people to be secure in their persona, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Procedural History

Robert Patton was indicted, among other charges, in the State of New Jersey, for possession of the gun which forms the basis of the federal crimes of which he has been convicted. In New Jersey, a

hearing was held on July 8, 1983, before Honorable E. Stevenson Fluharty who granted Patton's motion to suppress (32a).* Subsequently, the New Jersey charges were dismissed.

The Motion to Suppress

On November 14, 1983, a hearing on Patton's motion to suppress was held in the United States District Court, for the District of New Jersey, before the Honorable Harold A. Ackerman (3a et seq.) During the hearing in District Court, the entire transcript of the New Jersey hearing was admitted into evidence.

At the hearing in District Court, Officer Thomas Schultz testified that on January 22, 1983, at about 2:00 p.m., he stopped a white Mustang because it had no brake lights and because the driver failed

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*References to Petitioner's appendix are designated "A".

to signal for a turn which he made
As Schultz got out of his car, the driver of the Mustang, later identified as appellant Patton, got out of the Mustang and walked towards Schultz Patton left the driver's door open and when he neared Schultz, began to put his arm around Schultz, slapping him on the back and squeezing his arms
Patton also kept saying "hello" over and over again Schultz told Patton to stop touching him and asked Patton for his license and registration
Patton provided a driver's license
Schultz then became aware that there was a passenger in the car Schultz walked closer to the Mustang to see who and what was in it Because of Patton's behavior and because there was another person in the car, Schultz was somewhat afraid Schultz also went to the Mustang to see if there were any

weapons* or narcotics in the car which could explain Patton's behavior.

Whet he got to the open driver's door of the Mustang, Schultz told Patton why he had stopped him and offered to demonstrate that the brake lights were not working Schultz got into the Mustang, knelt on the front seat and pressed on the brake pedal When Schultz looked up, after pressing the brake, he saw that Patton was standing right in front of him, in fact, Patton's belt buckle was almost in his face Schultz got out of the Mustang and told Patton to get away from him and pushed him gently. Schultz' gun was

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*During the State hearing, Schultz testified that his reason for looking inside the car was: "I was looking for some evidence of the fact that Patton was acting in an odd manner. He didn't smell like he was intoxicated. I thought perhaps there were some narcotics in the car." Despite being asked specific questions, at no time during the State hearing did Schultz testify that he was looking for a weapon prior to seeing the handle of a gun under the seat.

exposed and he directed Patton to stand at the back of the Mustang. Patton complied.

While in the car, Schultz noticed that the passenger had a black vinyl case next to him. After Patton was ordered to the back of the car, Schultz told the passenger to take his hand off that case.

From outside of the Mustang, with his hand on the front driver's door for support, Schultz bent over and crouched down to see what was inside the car. Schultz then saw what appeared to be the checkered grips and hammer of a pistol. After seeing the handle of the gun, and after seeing the passenger put his hand back on the pouch, Schultz then closed the driver's door, walked around the car and seized the pouch. The pouch was heavy and upon squeezing it, Schultz felt what he believed to be a

gun. He opened the bag and removed a .22 pistol.

Schultz then closed the passenger's door, ordered Patton and the passenger to put their hands on the trunk of the Mustang and stay there.

Schultz got into his car and called for a back-up unit. When the unit arrived, Patton and the passenger were placed under arrest. After the arrest, Schultz retrieved a .45 pistol from under the front seat of the Mustang. Patton was then searched and some bullets and a spent cartridge were found in his coat pockets.

The Trial

Patton was tried before a jury and was convicted of both counts of the indictment. Patton raises no issues on this appeal relating to the conduct of the trial.

The Sentence

On February 14, 1964, Patton was sentenced to five (5) years imprisonment on Count II of the indictment and two (2) years on Count I, said sentences to run consecntively. Patton is presently serving his sentence at the Federal Correctional Institute at Terre Haute, Indiana.

REASONS FOR GRANTING THE WRIT

THE WRIT SHOULD BE GRANTED SO THAT THIS COURT CAN DECIDE WHETHER TEXAS v. BROWN 103 S.Ct. 1535 (1983) APPLIES WHERE THE POLICE ORDER THE DRIVER OF A CAR TO GET AWAY FROM THE DOOR OF THE CAR AND THEN SEES THE HANDLE OF A GUN INSIDE THE CAR.

In the opinion below, the District Court held that the initial stop of the Mustang was lawful and proper because of Patton's failure to make a turn signal and the absence of working brake lights (10a). The District Court relied upon Delaware v. Prouse, 440 U.S. 648, 663 (1979); United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975); and Terry v. Ohio, 392 U.S. 1 (1968). Petitioner takes no issue with this finding, nor with the District Court's general comments as to the preference of the Fourth Amendment for searches pursuant to warrant. Texas v. Brown, ___ U.S.___, 103 S.Ct. 1535 (1983).

However, the heart of the opinion in the District Court and the Third Circuit, is that the finding of the gun under the

seat falls within the "plain view" exception to the warrant requirement as defined in Coolidge v. New Hampshire, 403 U.S. 443 (1971) and Brown v. Texas, supra. It is in this finding that the Courts below erred.

Critical to the finding of plain view, is reliance upon Justice Rhenquist's opinion in Texas v. Brown, supra,

> Defendant Patton had himself left the driver's side door open and therefore could have no expectation of privacy as to the items visible as a result. As Justice Rhenquist noted in a similar context in Texas v. Brown, "the fact that (the police officer) 'changed his position' and 'bent down at an angle so that he could see what was inside' (the car)...is irrelevant to Fourth Amendment analysis. The general public could peer into the interior of (the) automobile from any number of angles; there is no reason (the officer) should be precluded from observing as an officer what would be entirely visible to him as a private citizen."(14a-15a).

Indeed, what would normally be considered a search, crouching down and peering

to see what is under a car seat,* can only be considered as falling under the "plain view" doctrine if the Texas v. Brown analysis is correctly applied here. That analysis, even if correct as to the facts of Texas v. Brown, is not applicable here.

In Texas v. Brown, the majority opinion states that since any member of the public could crouch down, or peer from many different angles to see what was inside the car, the police could do the same. This statement is correct only if one overlooks the difference between the police and the general public and only if one treats the opening of a door as a static or irrevocable act.

If I open the door to my home and a member of the general public walks up to it and begins to peer into my home from a

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*Or as Schultz put it, "I was looking for evidence..."

variety of angles, I can tell him to go away or I can close my door. Just because the door is opened and left open when no one is peering in, does not mean that I have no expectation of privacy when such a peering in does begin. My door is not frozen open and my opening it is not a static act.

However, if I open my door and a policeman walks up to me and orders me to stand aside,* and then crouches down to see what he could not otherwise see, I am not free to tell him to leave nor free to close the door, as I would with the general public. Thus, the Texas v. Brown equation of police and the general public's peering, is only apt where the door is left open under circumstances where anyone really could look inside. To hold otherwise would have chilling implications.

*The same holds if I have moved away from my door and the policeman orders me to not go back to it, or stand in front of it, or close it.

The facts presented here are that before the handle of the gun was seen, Schultz directed Patton, who had come back to the door of the car ("...I looked up and saw Mr. Patton's belt buckle nearly in my face..."), to get to the back of the car and stand there. Moreover, Schultz' weapon was exposed adding to the urgency of his orders to Patton
fore, Patton was prevented by police action from taking any action to prevent the search of his car.* The Texas v. Brown, supra analogy, which does not involve any police action in preventing an assertion of privacy, is not apt in this case. Accordingly, the finding of "plain view" below is incorrect.

The Courts below also err in their alternative basis for upholding the search. Michigan v. Long, ___U.S.___, 103 S.Ct.

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*The fact that the gun was secreted, evidences an expectation of privacy.

3469 (1983). Patton's overly friendly behavior only led Schultz to believe that he might be under the influence of some narcotic, since Patton did not smell of alcohol. At the State hearing, there was no mention of weapons. Indeed, Judge Fluharty complimented Schultz on his not having twisted the facts in order to save the search.

> ...your honesty and integrity will carry a long way in the future, and it is definitely to your credit (33a).

No less should be expected of witnesses in Federal proceedings.

For the reasons set forth above, the writ should be granted.

CONCLUSION

THE WRIT SHOULD BE GRANTED.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

84-5122

UNITED STATES OF AMERICA,

Appellee

v.

ROBERT J. PATTON,

Appellant

Appeal from the United States District Court
for the District of New Jersey
(D.C. Criminal No. 83-00229)

Submitted Pursuant to Third Circuit Rule 12(6)
September 13, 1984

Before: SEITZ, BECKER, Circuit Judges, and
TEITELBAUM, District Judge*

JUDGMENT ORDER

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*Honorable Hubert I. Teitelbaum, Chief Judge, Western District of Pennsylvania, sitting by designation.

After considering the contention raised by appellant, to wit, his fourth amendment rights were violated and the motion to suppress should have been granted, it is hereby

ADJUDGED AND ORDERED, that the judgment of the district court be and is hereby affirmed. See Michigan v. Long, ___U.S.___ 103 S.Ct. 3469 (1983); Texas v. Brown, ___ U.S.___, 103 S.Ct. 1535 (1983).

BY THE COURT

_____
Circuit Judge

_____
Sally Mrvos, Clerk

Dated: Sep. 28, 1984

THE COURT: Let the record reflect defendant is present with counsel.

Good morning, Mr. Grenhart.

MR. GRENHART: Good morning, your Honor.

THE COURT: Good morning, Mr. Waller.

MR. WALLER: Good morning, your Honor.

THE COURT: Mr. Grenhart, we haven't received your requests to charge.

MR. GRENHART: I have submitted none, your Honor. I will rely on the Court to protect my clients adequately.

THE COURT: There's one other matter I want to take up with you, but now is not the moment but I'm get back to you in a few moments. Let me deal with the motion to suppress at the outset.

This criminal matter is presently before me on defendant Robert J. Patton's motion to suppress certain evidence seized from an automobile driven by the defendant. Specifically, this evidence consists of a pistol allegedly found under the driver's

seat of this automobile. An evidentiary hearing was held on this motion on November 14, 1983, at which time, a single witness, Police Officer Thomas David Schultz, a nine-year veteran of the Winslow Township Police Department, testified. After careful consideration of this testimony and of the arguments of the parties, I have decided to deny the defendant's motion.

The facts relevant to this motion based on the uncontradicted testimony of Officer Schultz are as follows: At approximately 2:00 p.m. on January 22, 1983, Officer Schultz was stationed in his marked patrol car at the intersection of Highway 705 and Highway 536 in Winslow Township in lower Camden County, New Jersey. While there, he observed a white Ford Mustang slow to a stop at the intersection and make a turn. Officer Schultz, noting that the car had no brake lights and that the

operator did not use a turn signal when he made the turn, decided to stop the car.

After pulling the car to the side of the road, Officer Schultz "radioed the stop" and began to get out of his patrol car. As he did so, defendant Patton, the driver of the stopped vehicle, got out of his car leaving his door open and walked back towards Officer Schultz. Reaching Officer Schultz near the back of the Mustang, defendant Patton tried several times to put his arm around the officer, slap him on the back and squeeze his arms, while repeatedly saying the word "hello" to him. According to Officer Schultz, these actions, together with the animated way in which defendant Patton spoke, caused the officer to be, "a little scared" at this point in their encounter. Officer Schultz asked defendant Patton to stop touching him, explained why the car had been stopped, and requested that Patton produce his driver's license and registration. Patton produced

his license but was unable to produce the registration at that time.

I note that the registration was produced shortly thereafter by Barry Burenstein, the owner of the Mustang who had been riding with Patton as a passenger.

Having noticed that there was another occupant in the Mustang, Officer Shultz walked up to the still-open door on the driver's side of the Mustang. Officer Schultz testified that the reason he did so was that he was afraid for his safety and wanted to see who else was in the car. And if there were any weapons or narcotics inside that might explain Patton's odd behavior.

After a further brief conversation with Patton in which Officer Schultz again told him why the car had been stopped, and offered to demonstrate that the brake lights apparently were not working. He offered to demonstrate that the brake lights apparently were not working. Kneeling on the driver's

side of the front seat, Officer Schultz used his left foot to depress the brake pedal to test these lights.

As he was doing so, Officer Schultz noticed that the passengers had his hand on a black vinyl case which was sitting on the console between the two front seats. Officer Schultz then looked up and saw Patton moving uncomfortably close to him; in his words he "saw Mr. Patton's belt buckle nearly in his face." Stepping back out of the car, Officer Schultz instructed Patton to stand at the back of the car and told the passengers to take his hand off the black bag.

From outside the car, Officer Schultz then "looked around" to see if there was anything in the car. Doing so he saw the passenger put his hand back on the case. Standing outside the car and crouching down, Officer Schultz also saw what appeared to be about half-an-inch of the checkered grips and hammer of a pistol protruding from under the driver's seat.

The Officer ordered the passenger to get out of the car. Closing the driver's side door, Officer Schultz walked around to the front of the car to the passenger's side. He then grabbed the black vinyl bag. Squeezing it, Officer Schultz felt what he believed to be the grip, trigger guard and barrel of a pistol. He opened the bag and found a .22 caliber Luger automatic pistol.

Officer Schultz then closed the passenger side door and instructed Patton and the passenger to walk to the back of the Mustang, and ordered them both to put their hands on the trunk and to remain there. He walked around to the front of the car, secured the pistol from the black bag and radioed for a backup unit.

Once the backup unit had arrived, Officer Schultz instructed Patton and the passenger that they were under arrest. The pistol from under the driver's seat, which turned out to be a .45 automatic pistol, was then

retrieved. A search of Patton revealed that he had been carrying two live .45 caliber rounds in his right front coat pocket, one spent .45 shell in his left front jacket pocket, two handcuff keys and assorted papers.

Patton was subsequently indicted by a federal grand jury of possession of a firearm by a convicted felon in violation of 18 U.S.C. Section 1202, and interstate transport of a firearm without a serial number in violation of 18 U.S.C. Section 922(k).

Both Patton and his passenger, Barry Burenstein, were also brought before the Superior Court of New Jersey, Law Division Camden County, on two counts of possession of a firearm without a permit. In that matter, the Honorable E. Stevenson Fluharty, Judge of the Superior Court, granted defendant's motion to "suppress all evidence." Thereafter, the state dismissed the charges then pending against both of them.

As an initial matter, I find that Officer Schultz's stopping of the car being driven by defendant Patton was proper. The officer had observed the operator failing to signal when turning (a violation of N.J. S.A. 39:4-126) and driving without operable brake lights (a violation of N.J.S.A. 39:3-66). This is more than sufficient to constitute "articulable and reasonable suspicion" that an offense justifying s stop or "seizure" had been committed. See Delaware v. Prouse, 440 U.S. Page 648 at 663 (1979); United States v. Brignoni-Ponce, 422 U.S. 873 at 878 (1975). See further Terry v. Ohio, 392 U.S. Page 1 (1968).

Defendant Patton contends, however, that Officer Schultz' actions leading up to his sighting of the pistol under the driver's seat constitutes a search without probable cause. For each of the two reasons below, I conclude that Officer Schultz'

conduct did not violate defendant's Fourth Amendment rights.

It is well settled that the Fourth Amendment, "secures the persons, houses, papers and effects of the people against unreasonable searches and seizures, and requires the existence of probable cause before a warrant shall issue." Texas v. Brown, 51 U.S.L.W. 4361 at 4363 (April 19, 1983). The Supreme Court has often recognized that the Fourth Amendment bespeaks a preference for searches and seizures by means of a warrant, although some limited exceptions to this requirement have been recognized. See Coolidge v. New Hampshire, 403 U.S. 443 (1971); see, Warden v. Hayden, 387 U.S. 1294 (1967) (hot pursuit); United States v. Jeffers, 3412U.S. Page 48, at Pages 51 and 52 (1951) (exigent circumstances); Zap v. United States, 328 U.S. 624 at 630 (1946) (consent). One such

exception to the "warrant requirement" is the so-called "plain view" doctrine. See Coolidge v. New Hampshire, 403 U.S. at 443.

The "plain view" doctrine, as Justice Rhenquist has recently noted, "provides grounds for seizure of an item when an officer's access to an object has some prior justification under the Fourth Amendment." Texas v. Brown, 51 U.S.L.W. at 4364 (plurality opinion).

More specifically, the plurality of the opinion of the Court in Coolidge v. New Hampshire, found that the doctrine permits the warrantless seizure by police of private possessions where three requirements are satisfied. First, the police officer must lawfully make an "initial intrusion" or otherwise properly be in a position from which he can observe a particular area. See pages 465 to 86 of that opinion. Second, the officer must discover incriminiating

evidence "inadvertently," which is to say, he may not "know in advance the location of (certain) evidence and intend to seize it," relying on the plain view doctrine only as a pretext. See page 470. See Texas v. Brown, 51 U.S.L.W. at 4363. Finally, it must be "immediately apparent" to the officer that the items observed may be evidence of a crime, contraband or otherwise subject to seizure. See Page 466.

Here an analysis of the facts leads inexorably to the conclusion that Officer Schultz' actions fell within the requirements of the "plain view" doctrine. As to the first requirement articulated by Coolidge, I have already determined that the initial stop of the Mustang by the officer was lawful, since the observed lack of workable brake lights and the failure to signal when turning both constituted "articulable and reasonable suspicion." Second,

there is nothing to suggest that Officer Schultz had any prior knowledge of the location or even of the existence of the pistol under the driver's seat prior to inadvertently seeing it protruding slightly therefrom. That Officer Schultz was at the time "looking around" in the car does not in any way sugget pretext nor does the fact that he was "crouching down" outside the car suggest pretext.

Defendant Patton had himself left the driver's side door open and therefore could have no expectation of privacy as to items visible as a result. As Justice Rhenquist noted in a similar context in Texas v. Brown, "the fact that (the police officer) 'changed his position' and 'bent down at an angle so that he could see what was inside' (the car)...is irrelevant to Fourth Amendment analysis. The general public could peer into the interior of (the) automobile from any

number of angles; there is no reason (the officer) should be precluded from observing as an officer what would be entirely visible to him as a private citizen." See Page 4364 of that opinion.

Finally, it was without doubt immediately apparent to Officer Schultz who was well acquainted with firearms, that the item he observed, namely the pistol, may be "evidence of a crime, contraband or otherwise subject to seizure." In short, I find that the conduct that enabled Officer Schultz to observe the interior of the Mustang, and in particular to view the edge of the pistol protruding out from under the dirver's seat, falls within the "plain view" exception and was not a search within the meaning of the Fourth Amendment.

Even if Officer Schultz' conduct did constitute some invasion of defendant

Patton's privacy rights, I find that this conduct is alternatively justified in these circumstances by the Supreme Court's recent extension of the Terry doctrine in Michigan v. Long, 51 U.S.L.W. 5231 (July 6, 1983).

In Terry v. Ohio, 392 U.S. Page 1, (1968), the Supreme Court upheld the validity of a "pat down" protective search for weapons when a police officer possesses an articulable suspicion that an individual is armed and dangerous, even where that officer lacks probable cause to arrest. The Court reasoned that in such instances it is unreasonable to deny a police officer the right "to neutralize the threat of physical harm" when such articulable suspicion is present. Recognizing that there are many such encounters between police and the public that fall short of an arrest or a full search, the Terry court established the standard to be used in evaluating the reasonableness of an

officer's conduct in those situations. See pages 19 and 20 of that opinion.

In general, the Court stated, an officer's actions are justified if they are reasonably related in scope to the circumstances justifying the interference. Specifically, to justify his conduct, an officer must point to "specific and articulable facts" which, taken with "rational inferences" would warrant a person of reasonable caution to conclude that his actions were reasonable. See pages 21 and 22 of that opinion.

While Terry itself involved a limited "pat down" search of an individual's outer clothing in a check for weapons, the underlying doctrine has recently been applied by the court to the automobile context as well. In Michigan v. Long, the court, noting that vehicle stops are "fraught with danger," extended Terry to include "an area search of the passenger compartment of automobiles to

uncover weapons, as long as (the police) possess an articulable and objectively reasonable belief that the suspect is potentially dangerous." 51 U.S.L.W. at pages 5236 to 37. The Court held that the fact that a suspect is outside the car does not in and of itself diminish this right to search it. In sum, the court stated that a "search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden... permissible" under the Fourth Amendment if the police officer possesses Terry's requirement of a reasonable believe that the suspect is dangerous. See Page 5236 of that opinion.

Here, the facts clearly support Officer Schultz' conclusion that he may have been in danger. Defendant Patton's erratic behavior, (such as his strange initial encounters with the officer and his moving "uncomfortably close" during the testing of

the brake lights), together with the presence of a passenger inside the Mustang and that passenger's handling of the black vinyl case, constitute specific and articulable facts, which taken together with rational inferences from these facts, reasonably warranted Officer Schultz in believing that Patton was dangerous and might have gained immediate control of weapons. It is thus clear that Officer Schultz' conduct was reasonably related in scope to the exigent circumstances he faced, and that, therefore, his actions did not violate defendant's Fourth Amendment rights.

In sum, I have determined that Officer Schultz' conduct in finding and eventually seizing the pistol located under the driver's seat in the car operated by defendant Patton did not constitute a violation of defendant's Fourth Amendment rights.

Pursuant to United States v. Novak, 715 F.2d 810 (Third Circuit 1983), and Section

II(6)(a) of the Plan for Prompt Disposition of Criminal Cases of this District, I find that the excludable period under Section 3161(h)(1)(F) of the Speedy Trial Act resulting from my consideration of this motion was reasonable. After a full hearing, I reserved this matter on November 14, 1983, and the intervening period has been used for analysis of the facts and of the law pertinent to this suppression motion. See United States v. Cobb, 697 F.2d Page 38, 46, Footnote 8, (3d Cir. 1983).

Mr. Waller, I will ask you to kindly submit an order in accordance with my determination.

THE COURT: Very well.

In connection with this matter, the Court wants to make an observation which I think is long overdue. Many times -- and it really doesn't relate to this case, but it is pointed up by this case. Many times, the Court has heard defense counsel facetiously state that police officers, troopers and the like aren't credible and aren't truthful and aren't honest, and I think, to the credit of this officer, he was honest, he was truthful, he was candid and he was forthright. I just thought that should be said because my general feeling is and my experience has been that most of the time, in fact all of the times, whether the motions are

granted or denied, I'm satisfied that the officers and the troopers are very honest, sincere, forthright, candid men, and this officer was and I compliment you, sir, because it could have been very easily handled in a different fashion.

OFFICER SCHULTZ: Thank you, sir.

THE COURT: And I'm sure you know the law probably as well or better than I do and it would not have been hard to twist or turn the facts and you didn't see fit to do that. That is to your credit.

The Court finds as a matter of fact that the officer did stop the automobile for a valid reason, to wit,

as he indicated, again to his credit, he did not observe the tail lights and he didn't observe the turn signal. He didn't say emphatically and unequivocally that they weren't operative. He said he didn't observe them. That's sufficient under Delaware versus Prouse, as far as the Court is concerned, to stop the vehicle in question.

He did stop the vehicle in question. As he did so, the driver exited the car, left the door open and approached the officer and, so, they met. Whether they met at the side of the car, to the rear of the car or somewhere between the police car and the passenger car is of little

significance. The fact of the matter is, and the Court finds, that the one defendant exited the vehicle. He was acting, to use the officer's terms, in a strange way. He was overly friendly, he was patting the officer on the back, he was telling him, "Hello, everything is okay, everything is fine"; and that I find, as a fact, he was doing.

The officer indicated he smelled no odor of alcohol. However, there was no testimony to indicate that the eyes were dilated or there was anything at all which would give rise to a reasonable suspicion, more than a hunch, a reasonable suspicion the defendant was in fact under the influence of CDS.

The officer testified, and I find as a fact, that the defendant was advised why the vehicle was stopped and the license was requested, license was produced.

The officer then tells us he went forward to demonstrate that the brake lights were not in fact working. No indication, however, that when the defendant was advised that the reason he was stopped was the brake lights weren't working, that the defendant in any way indicated to the officer that the brake lights were operative; but the officer went forth to demonstrate brake lights.

At this point, I'm a little unclear. The officer indicated that he had his left foot in, was kneeling

on the seat, wasn't quite certain exactly of his position. That's understandable, that's recognizable. It seems odd the left foot would be in and, again, I would say and submit it would be easy for the officer to say he had his right foot in; but be that as it may, that's what he was doing.

He indicated that he was concerned for his safety because of the conduct of the defendant in the manner in which he was handling the officer in his, "friendly fashion", and the way in which he was putting his arms around him and the like. Certainly, there would have been every justifiable reason at that point to conduct a pat-down. There was no

testimony that that was done.

It would seem that if the officer was truly concerned at that point -- and he didn't emphasize he was terribly concerned at that point. In fact, to use his own terms, it was on reflection after he saw the gun with a checkered handle that he thought perhaps the gentleman was checking to see if he had on a vest and the officer honestly said that was on reflection. So, that's hindsight and not foresight. Again, to the officer's credit.

When the officer approached the vehicle and saw the passenger, he had every right under Pennsylvania versus Mimms to have the passenger exit the vehicle and it was his intention to do

so and if in fact he was fearful for his safety. He didn't testify that he did that, however. The passenger sat there quietly with the case, with his hand on the case.

The officer indicated he asked him to remove his hand from the case, and he did, and then later put it back again. What the officer told us, and which I find as a fact really took place, was that the officer, to use his own terms and his own words, "I was looking for evidence of narcotics in the car." He indicated he was bending down and crouching at the time.

Now, the real issue, then, is was he conducting a search because he had probable cause to believe that a

crime was in fact being committed or did he have a hunch? And he has many years of experience. I'm sure he has a great deal of insight. That insight is generally very accurate, but the law is such that he must work on more than a hunch. We have to have probable cause, and I find as a fact that there was nothing in the testimony that would substantiate probable cause to believe that the defendant who would exit the car was in fact under the influence of a controlled dangerous substance.

So, if in fact there was no probable cause to believe that, then it would follow that the bending down, crouching and looking for evidence of narcotics in the car certainly was not appropriate and proper under the

circumstances. This is not to suggest, as I said, that the officer didn't have a right to pat-down either person, require both persons to exit the vehicle; but he didn't do that, and I don't say that he had to. But it's indicative of the fact that, as he said in his own words, that "After I saw the checkered handle, then I became vitally concerned for my safety", and that's when it was that he required the seated passenger to exit the vehicle, took the bag, felt the bag, felt evidence of a weapon, opened it, found the weapon. All perfectly proper.

Again to the officer's credit, he testified, "I could not see the

weapon until I bent down." Now, that would indicate, at least to the Court, that it was not in plain view. The officer had a right to be there, but was this weapon in such a conspicuous position that he saw it in, "plain view", under Coolidge versus N.H.

Again to the officer's credit, it would have been easy for him to say that, "As I approached the vehicle to demonstrate how the brakes worked, I looked in the car and there it was, the handle sticking out." No. He said it was only a half inch. He couldn't see it until he actually bent down, and at that point, that's when he saw it.

Now, if in fact he had no right to conduct that search because he had

no probable cause to believe that there was in fact a controlled dangerous substance in the vehicle, which I find as a fact he did not have such probable cause, then it follows that the discovery of the gun was not in plain view. It was discovered during the course of the search, which he had no right to conduct.

Once having discovered that gun as a result of a search which he had no right to conduct, then naturally it would follow that further searches, further arrests and further actions which flow from the original search, which wasn't substantiated by probable cause would fail, taking the fruit of the poisonous tree.

The only thing I can say is that, as I've said, to the officer's credit,

and I'm very sincere when I say it, you didn't tailor your testimony. You didn't try to distort the facts, you didn't try to change these facts from what they actually were; but by being honest and being candid, I am going to be suppressing the evidence and granting the motion. But you must remember that we have rights in this country. Those rights are vital ones and they have to be protected and your honesty and integrity will carry a long way in the future, and it is definitely to your credit.

I find as a fact that the initial search was not based upon probable cause. As a result thereof, all arrests and searches which flow therefrom fail by reason of the

fruit of the poisonous tree.

It follows, therefore, that the motion to suppress all evidence shall be granted.

MR. FRIEDMAN: Thank you, your Honor.

MR. BLUMBERG: Thank you.

(Whereupon the proceedings were concluded).

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